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Brief of Stickney for D. C.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 259.

Filed April 21, 1899.

JAMES M. SIGAFUS,

Plaintiff in Error,

against

DUDLEY PORTER *et al.*,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

ALBERT STICKNEY,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 259.

JAMES M. SIGAFUS,
Plaintiff in Error,

VERSUS

DUDLEY PORTER *et al.*,
Defendants in Error.

Brief for Defendants in Error on certificate from the United States Circuit Court of Appeals for the Second Circuit.

The question to be decided is, whether the measure of damages, in a common law action for deceit, on a sale of land, is the difference between the actual value of the land and the consideration paid, with other outlay attributable to defendant's fraud, or the difference between the actual value and the value as represented.

The facts, as stated in the record, are as follows:

"The action is one to recover damages for deceit by defendant inducing the purchase of a gold mine (real

estate, *improvements, plant,* and mining rights) by the plaintiffs. There was evidence tending to show and the jury found that by false *representations and* fraudulent *devices* defendant misled plaintiffs as to the *history, condition* and *value* of the mine; that defendant knew the falsity of such representations; that they were material; that plaintiffs relied upon them in good faith, and were induced thereby to make the purchase, which they would not have made except for such false representations and fraudulent devices. There was conflicting evidence, but *sufficient proof to enable the jury to determine* as to what would have been *the value of the mine* had it been such as defendant *represented* it to be. There was conflicting evidence, but *sufficient proof to enable the jury to determine* as to what was *in fact the value of the mine* on the day the purchase was consummated and the property transferred. There was no conflict of evidence as to what was paid for the mine nor as to what was laid out upon it by plaintiffs after purchase in order to develop it."

The record shows, therefore, that the "false representations and fraudulent devices" established in this case concerned, not mere matters of estimate, or opinion, but facts. The record also shows, that the evidence before the jury was such as to "enable them to determine" both the "actual value" of the property, and its value as "represented,"—"on the day the purchase was consummated and the property transferred."

Our entire contention, moreover, is, that the true measure of damages is the difference between these two values—*both taken on the same date.* This feature of the position has been studiously ignored by our opponents, throughout their entire argument. It was necessary, that they should ignore it.

Until the decision of *Smith* v. *Bolles,* 132 U. S., 125, the rule, that the measure of damages in such a case is the difference between the actual value and the value as represented, was established by an overwhelming volume of authority. It was not open to controversy.

We respectfully submit, that the old established rule is the only one which rests on sound reason, and that the Court, in the decision of *Smith* v. *Bolles,* had no intention of abolishing that old established rule.

We submit the following positions:

I.—Until the decision of *Smith* v. *Bolles,* the rule, that the measure of damages is the difference between the actual value and the value as represented, was established by an overwhelming volume of authority.

1. The rule, and its reason, are stated in the following opinions of the Massachusetts Supreme Court, the New York Court of Appeals, and the Supreme Court of Kansas.

Morse v. *Hutchins,* 102 Mass., 439. Tort for deceit, GRAY, J. "The rule of damages was rightly stated to the jury. It is *now well settled* that, in actions for *deceit or breach of warranty,* the measure of damages is the *difference* between the *actual value* of the property at the time of the purchase, and its *value if the property had been what it was represented or warranted* to be. (Citing Stiles *v.* White, 11 Met., 356. Tuttle *v.* Brown, 4 Gray, 457. Whitmore *v.* South Boston Iron Co., 2 Allen, 52. Fisk *v.* Hicks, 11 Foster (N. H.), 535. Woodward *v.* Thacher, 21 Verm., 580. Muller *v.* Eno, 4 Kernan, 597. Sherwood *v.* Sutton, 5 Mason, 1. Loder *v.* Kekule, 3 C. B. (N. S.), 128. Dingle *v.* Hare, 7 C. B. (N. S.), 145. Jones *v.* Just, Law Rep., 3 Q. B., 197.) *This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him.* To allow to the plaintiff (as the learned counsel for the plaintiff argued in this case) *only the*

difference between the *real value* of the property *and* the *price* which he was induced to pay for it, would be to make any *advantage* lawfully secured to the innocent purchaser in the original bargain *inure to the benefit of the wrongdoer;* and in proportion as the original price was low, would afford a *protection to the party who had broken,* at the *expense of the party who was ready to abide by the terms of the contract.* The fact that the property sold was of such a character as to make it *difficult to ascertain with exactness* what its *value* would have been *if it had conformed to the contract* affords no reason for exempting the defendant from any part of the direct consequences of his fraud. And the *value may be estimated as easily in this action as in an action against him for an entire refusal to perform his contract."*

Krumm v. *Beach,* 96 N. Y., 398, which was an action for deceit on a sale of land:

"The measure of damages in such a case is *full indemnity to the injured party;* the entire amount of his *loss* occasioned *by the fraud.* (*Dimmick* v. *Lockwood, 10 Wend., 105; Wardell* v. *Fosdick, 13 Johns., 325, and, Whitney* v. *Allaire, 1 Comst., 305-6.*) The first of these cases plainly points out the *difference* between actions for a *breach of covenant* and those founded upon *fraud.* In the *former* the *damages* are always bounded by the *consideration* and interest, which *often fall short of full indemnity;* a rule said to be founded "upon considerations of public policy without reference to the actual damage sustained by the party." (*Whitney* v. *Allaire, supra*); but where *fraud* is established, *full and complete indemnity* is awarded. That full indemnity *may go beyond the consideration paid.* The purchaser of land, as of other property, has a right to make a good bargain if he can, provided only that he deals honestly. Often *the profit secured above the price paid is the sole motive for the purchase,* and where there is an exchange of lands to some extent,

one dealing fairly may sell his own at a high price and secure another's at a low one. To the *entire benefit of his bargain he is entitled.* If there has been no fraud he would have had it; he *should not lose it because the other party had been dishonest.* The measure of damages, therefore, should be that adopted by the Court below; the *difference in value between the property conveyed and that which would have been conveyed had the property been as represented,* and the actual contract honestly fulfilled."

Tracy v. *Gunn,* 29 Kansas, 508, (1883). Action by vendee against vendor for damages for deceit on a total failure of title. The Court say, per Mr. Justice BREWER: "The second question is as to the measure of damages. Plaintiff in error claims that it was only *the price paid and interest,* while the Court admitted testimony as to the value of the property at the time of the deed, and rendered judgment for such value. * * * In breaches of contract to convey real estate, a peculiar distinction as to the measure of damages runs though the cases, and that founded upon the motive with which the vendor acts. If he acts in *good faith,* it is held that the *contract price* becomes the measure of damages, while if he acts *mala fide,* the vendee may recover the actual damages." The learned Justice then quotes and approves Field on Damages, § 485; Sedgwick on Damages, p. 209, to the effect that in such a case the vendee is entitled to damages for the "*loss of his bargain,*" and continues:

"It is enough for us to say that the doctrine seems to be clearly established, that it is founded on justice, and that it is in harmony with the general rules of the law which aims to give to a party all the damages which he has actually sustained."

2. The universality of the acceptance of the rule is shown by the following line of authorities:

Whitney v. *Allaire,* 1 N. Y., 305, 312.
Miller v. *Barber,* 66 N. Y., 558.

Hubbell v. *Meigs,* 50 N. Y., 480, 491.
Pryor v. *Foster,* 130 N. Y., 171, 178.
Pierce v. *Tiersch,* 40 Ohio St., 168, 173 (1883).
Lunn v. *Shermer,* 93 N. C., 164, 170 (1885).
Shinnabarger v. *Shelton,* 41 Mo. App., 147, p. 157, 1890.
Gunther v. *Ullrich,* 52 N. W. Rep., 88 (Wis. Supm. Ct., 1892).
Wright v. *Roach,* 57 Maine, 600 (1870).
Williams v. *McFadden,* 23 Fla., 143, 149 (1887).
Herfort v. *Cramer,* 7 Col., 483, 491, 1884.
Foster v. *Kennedy's Admr.,* 38 Ala., 359, 1862.
Budlong v. *Cunningham,* 11 Ill. App., 28, 32.
Johnston v. *Beeney,* 5 Ill. App., 604.
S. C., 9 Ill. App., 64.
Antle v. *Sexton,* 32 Ill. App., 437, 440.
S. C., 137 Ill., 410, 415.
Drew v. *Beall,* 62 Ill., 164, 168.
Stiles v. *White,* 11 Met., 356.
Harvey v. *Hadley,* 87 Cal., 557.
Murray v. *Jennings,* 42 Conn., 12.
Miller v. *Barber,* 66 N. Y., 558.
Thompson v. *Burgey,* 36 Pa. St., 403.
Stetson v. *Croskey,* 52 Pa. St., 230.
Bowman v. *Parker,* 40 Vermont, 410, 413-414.
Noyes v. *Blodgett,* 58 N. H., 502.
Gates v. *Reynolds,* 13 Iowa, 1.
Molberly v. *Alexander,* 19 Iowa., 162.
White v. *Smith,* 54 Iowa, 233.
Page v. *Wells,* 37 Mich., 415, 421.
Jackson v. *Armstrong,* 50 Mich., 65, 69.
Stockham v. *Cheney,* 62 Mich., 10, 14.
Campbell v. *Hillman.* 15 B. Monroe, 508 (Kentucky).
Estell v. *Myers,* 56 Mississippi, 800, 805-806.

Young v. *Filley,* 19 Nebraska, 543.
Long v. *Clapp,* 15 Neb., 417, 420.
Ansyln v. *Frank,* 8 Missouri App., 242, 248.
Tracey v. *Gunn,* 29 Kansas, 508.

3. The following were cases of warranty where the same rule of damages was applied:

Clare v. *Maynard,* 7 C. & P., 741.
Walker v. *France,* 112 Pa. St., 203, 211.
Seigworth v. *Leffel,* 76 Pa. St., 476.
Jones v. *Just,* L. R., 3 Q. B., 197, 200-201.
Callanan v. *Brown & Co.,* 31 Iowa, 333 (341).
Maxted v. *Fowler,* 94 Mich., 106.
Tuttle v. *Brown,* 4 Gray (Mass.), 457.
Whitmore v. *So. Boston Iron Co.,* 2 Allen (Mass.), 52, 60.
Peterkin v. *Martin,* 30 Louisiana Ann., 894.
Foster v. *Baer,* 7 Louisiana Ann., 613.
Slaughter v. *McRae,* 3 Louisiana Ann., 455.

4. So far as we are aware, down to the decision of *Smith* v. *Bolles,* not one well considered opinion can be found, coming from any court of authority, where there has been, in the language of Mr. Justice CURTIS, in *Carroll* v. *Carroll's Lessee,* 16 Howard, 275, "an application of the judicial mind to the precise question," where this established rule has been so much as called in question.

Peek v. *Derry,* Law Rep., 37 Chanc. Div., 541, on which the defense so strongly depended on the argument in the court below, as establishing a different rule in England, is not at variance with the established rule. An examination of the record in that case shows that, on the hearing below the action was dismissed, and, consequently, the question of damages was there neither argued nor considered. On the appeal, too, the questions which were the subject of the main discussion by counsel concerned only the right of the

plaintiff to any recovery whatever. *Prior to the rendering of the opinion of the Appellate Court, the arguments of counsel on the appeal made no allusion to the rule of damages.* But Lord Justice Cotton, in reversing the decision below, added, at the end of his opinion, a paragraph on the question of damages. In that paragraph he said that the plaintiff would be entitled to recover "the difference between the sum given for the shares and the value of the shares." Evidently, that opinion went on the assumption, that the "sum given" was—in that case—equal to the value represented; and, consequently, a recovery on that basis—in that case—would, in substance and effect, conform to the established rule.

Thereafter (p. 590) the question of damages was argued. But the only point of substantial controversy on the later argument was, not as to the measure of damages, but the date, at which the measure should be applied.

Thereupon the Court said (p. 591): "One rather difficult point was *omitted in the argument.* * * * It is one of considerable difficulty. The question which arose was this: There *being no evidence which would really fix the loss,* we thought there ought to be an inquiry; but the *question was to what period ought that inquiry to refer?*"

That was really the only point considered, and decided, in *Peek* v. *Derry.*

Obviously that case, like many others, was one where the special facts led both counsel and Court to ignore the general rule. And it is quite obvious, that neither Court nor counsel had any intention of questioning the established rule.

There are many such cases. Many cases, then, can be cited, where, for one or another reason, the well established general rule has been inapplicable, or has not been invoked.

But we find *no well considered case,* where the rule, when invoked, and when applicable, has been denied, or even questioned.

II.—At the outset, it is necessary to call to the attention of the Court the well established fundamental distinction, between the two opposite remedies in the case of fraudulent representations; the one being that of rescission, usually asserted in a court of equity, which proceeds on a disaffirmance of the contract, and entitles the purchaser to recover the consideration paid —as such; the other being the right to damages in a common law action of deceit, which proceeds on an affirmance of the contract, and entitles the purchaser to recover the damages caused by the false representations; which is the difference between the actual value and the value represented.

Yeomans v. *Bell,* 151 N. Y., 230.
Bradley v. *Bosley,* 1 Barb. Ch., 125, a decision by Chancellor Walworth.
Krumm v. *Beach,* 96 N. Y., 398.
Gould v. *Cayuga Bank,* 86 N. Y., 75.
S. C., 99 N. Y., 333.

The disregard of this distinction, a distinction which no well considered authority denies, has been the source of nearly all the doubts and discrepancies in the statement of the rule of damages in actions of deceit. Indeed, it is submitted with all possible deference, that it was the disregard of this distinction, which led the Court in *Smith* v. *Bolles* to make some unnecessary statements, which are at variance with the mass of authority already cited. The right, in a case of false representations, to recover the money consideration paid—as such—rests only on the right of rescission. No doubt, there will at times be a case, where a purchase had been made of property which was absolutely worthless, where it will happen,

that the money paid is, in that particular case, equal to the damage from the deceit. In such cases, however, the money consideration merely happens to be the equivalent of the damage, for the reason, that it happens to be equal to the value as represented; and is, therefore, the equivalent of the difference between the represented value, and zero—which is the actual value. Nevertheless the law still is, that the money consideration—as money consideration—can be recovered only on the basis of recission. It cannot, therefore, ordinarily, be recovered in an action for deceit. For that action, as before stated, rests on an affirmance.

In some cases, too, confusion may have arisen from the circumstance that the contract price is admissible *as evidence,* of the value of the thing as it is represented. That it is evidence, but not conclusive evidence, on that point, is laid down in several cases, which nevertheless affirm the rule for which we contend.

Carr v. *Moore,* 41 N. H., 131.
Estell v. *Myers,* 56 Miss., 800.
Lunn v. *Shermer,* 93 N. C., 164.

So it has often happened, in cases where the distinction was not clearly brought out, that the contract price and the represented value have been used as convertible terms. Such a case was

Sherwood v. *Sutton,* 5 Mason, 1,

of which the headnote states the rule of damages precisely as we are here contending for it; while from the opinion of Mr. Justice STORY it might seem that the contract price was the basis of the estimate of damages which he there allowed. Of the same class was the case of

Weybrick & Co. v. *Harris,* 31 Kansas, 92,

in which the opinion of the Court by Mr. Justice BREWER states the rule in both forms. It is perfectly apparent however that the learned Justice did not in-

tend to sanction any departure from the established rule, which he stated as follows:

"If the vendor knows nothing of the contracts made by the vendee or the specific purpose for which the property is intended, and knows simply that the purchaser is seeking for an article of the kind and quality named, his liability is limited to the *difference between the value of the article actually delivered and that of the article which the parties intended to purchase and contract for.*"

III.—The rule so established is the only one which rests on sound reason, which will work out justice, and place the entire transaction, including the question of damages, on the basis contemplated by the parties themselves.

That has been the view of the jurists who have decided the long line of cases above cited.

But that view will be seen to be essentially reasonable, and the only one that is reasonable.

1. The rule in actions for deceit should be, at least, as favorable to the party injured, as in cases of warranty.

In the case of a mere contract of warranty, made honestly, where property sold is warranted—to be of a certain quality, the rule is uncontroverted; the measure of damages, on a breach of such a contract, is the difference between the actual value of the property received, and the value of the property as warranted. In other words, the defendant is compelled to make good his statements. That is the case, where the misrepresentation has been honestly made, as matter of contract.

In cases of deceit, where the ground of the liability

is a representation wilfully false, made for the express purpose of deceit and fraud, the rule should not be more favorable to the wrongdoer, than it is to the party who merely honestly makes a contract, which he afterwards fails to perform.

2. The established rule is the only one which will carry into effect the controlling principle, as it is stated by our learned opponents, by all the authorities, and in *Smith* v. *Bolles;* that is, that the recovery is to be of "such damages as naturally and proximately resulted from the fraud;" or "the natural and necessary result of the false representations."

Brief of plaintiff in error, pp. 3 & 8.

We accept, without hesitation, these statements of the principle underlying the rule.

Let us now see how the principle can be worked out in practice.

In cases of rescission, where the purchased property is returned, there is, no doubt, the logical legal basis for a recovery of the money paid—as such.

In actions for deceit, however, where the property purchased is retained, where, consequently, the damage must be limited to the loss caused by the deceit, it is easily seen, that the money paid, as such, affords no criterion of the resulting damage. Take a simple case, the purchase of a farm, represented, among other things, to contain two hundred acres of rich intervale; in fact, containing only one hundred acres of such land. The fraud proved is only the misrepresentation of that one fact. The damage recoverable could legally be based on only that one misrepresentation. Although a rescission would entitle the purchaser to recover the entire consideration, yet his common law action of deceit, based on a retention of the property, would, very clearly, entitle him only to the difference in value between a farm containing two hundred acres, and one containing one hundred acres, of intervale; in other words, to

the difference between the actual value and the value as represented.

So, too, in the case of a farm for raising gold, commonly called a gold mine. Take the case, where the vendor has falsely represented, that the ore in the mine lies in a continuous unbroken vein, running a certain number of ounces of gold to the ton, with a certain number of tons of ore of a particular grade actually "in sight"; the fact being, that the vendor has for years been working the mine, so as to leave considerable stretches of the richest ore exposed to sight, and has filled up long spaces of the vein which were completely barren, so that they could not be discovered on any ordinary examination. Suppose, in such a case, that the purchaser, after his purchase, has taken out large quantities of poor ore and worthless dirt, in a fruitless search for ore that will pay. A return of the property in its original condition, in other words rescission, has been made impossible, by the very action which the vendor intended, the removal of large amounts of ore by the purchaser.

In such a case, what rule can possibly be devised, other than the old established one, to fix the damage "proximately resulting" from the deceit? The consideration paid, together with the money spent in development, may be very large. The difference, however, between the actual value of the property and its value upon such representations as a jury finds were false, may be very slight. In a few exceptional cases, it may be possible to recover money spent in the search for the ore falsely stated to have been in the mine. But, in the general run of cases, can it be reasonably contended, that the purchaser can recover his money expenditure—in an action for deceit? No doubt, the fraud perpetrated gave him his other right—that of rescission; and, if a rescission were still possible, he would be entitled, on a rescission, to recover the consideration paid—as such. In the action for deceit, however, his right is only to the above stated difference.

3. Careful consideration will show, moreover, that the established rule is the only one that will effectuate the intention of the parties to the transaction, as expressed by themselves, and that any other will put the transaction on a basis which the parties themselves never contemplated.

Assume a case where, on the representations made, the value of the property sold as represented is twenty-five thousand dollars. But its actual value is only fifteen thousand. For their own good reasons, the parties make a sale at fifteen thousand. In other words, the price paid happens to be precisely equal to the real value. The purchaser believes the representations; in other words, he believes the value to be twenty-five thousand dollars. Such is the statement of the seller, on which the purchaser relies, and on which the seller intends him to rely. In other words, the seller intends the purchaser to believe, that he is getting a property worth twenty-five thousand dollars at the price of fifteen thousand. The purchaser makes the purchase by reason of that belief; and the belief is caused by the wilful fraud of the seller. The transaction intended by the parties goes on the very basis, that the purchaser is to have a profit of ten thousand dollars. That is the result intended, by the transaction as expressed by them.

Under the rule for which our opponents contend, there can be no recovery whatever, because the consideration paid is no more than the actual value. In other words, the buyer must lose his profit of ten thousand dollars, to which he was entitled under the transaction, as expressed, and intended, by both parties.

The buyer, in such a case, is justly entitled to the value, which he believed he was getting; that belief being created by the seller, who knew the real facts, and produced the belief by the perpetration of a wilful fraud. The seller is justly condemned to make good to the buyer the value which he stated to the buyer, falsely, with the intent to deceive, which constituted the very basis of the transaction.

The precise fraud, intended by the guilty party, was the sale of a property actually worth only fifteen thousand dollars, on the belief of the purchaser, that he was getting a property worth twenty-five thousand dollars. No rule can be devised, which will work justice, in that case, or in any case of wilful deceit, except the rule that the guilty party shall be compelled to make good his statements. On the other hand, the rule for which our opponents contend, necessarily has for its result the protection of the party committing the fraud, and the protection of the precise fraud, which the guilty party intended.

4. If it be said, that the result of the old established rule is to give the purchaser prospective profits, the answer is, that such is the intention of the parties to the transaction.

The seller says, in effect, "I am selling you a property worth twenty-five thousand dollars, at such a price as will ensure you a profit of ten thousand." That is the precise inducement, held out to the purchaser, on the basis of which he makes the uprchase. That precise profit is exactly what the transaction—as expressed between the parties—gives him. No other rule will effectuate the transaction on the basis contemplated, and intended, by the parties.

We accept unhesitatingly the rule as quoted in *Smith* v. *Bolles* by the learned Chief Justice from *Crater* v. *Binninger*, 33 N. J. L., 513, that "the test is that those results are proximate which the *wrongdoer from his position must have contemplated* as the probable *consequence of his fraud* or breach of contract."

In the case supposed the "result which the wrongdoer from his position must have contemplated" is the loss of that profit—of ten thousand dollars. That is the precise loss "contemplated," by the party committing the fraud, as the consequence of his fraud. He intends that precise damage. Both buyer and seller intend the transaction to go on the basis of value represented. That

being so, we respectfully submit, that a court has no option, but to enforce the transaction on the basis intended by the parties. When the parties both intend a sale at a price less than the value as stated by the seller, the courts have no right—to put the transaction on any other basis than the one on which it is placed by the parties themselves.

It is wholly inaccurate, to apply the term "speculative," in its commercial sense, to the plaintiff's recovery under the established rule. A "speculation," in that sense, involves the purchase of property with a view to its advance in value at a future day. Under the established rule of damages, the comparison of the two values —"represented" and "actual"—is to be made as of the same point of time, the date of the sale. The plaintiff's recovery is for the difference between the two at that date.

Nor does the established rule involve any question of future prices on the "market." The rule for which we contend, has no concern with "market" value—as such—, but only with "actual" value.

5. The contention of the defendant, that the established rule allows "contingent," or "speculative" profits, has no sound foundation.

The recovery, under the rule, it must be repeated, is of the difference between actual value and represented value, both taken on the same date.

The false statements submitted to the jury, in every such case, concern only matters of fact. So the certificate in this record states as to this case. If a man falsely represents, that a certain gold mine has actually "insight," as the experts use the phrase, a certain number of tons of ore, running a certain number of ounces of gold to the ton, how is it possible, that there can be anything more thoroughly in the nature of a statement of fact? If, thereafter, it appears that, by what may be termed mineral forgery, he has made an accurate examination of the mine impos-

sible, and has thus deceived his vendee by his false statements of mere quantities, of mere figures, how is it possible more completely to exclude from the jury's computation of damages the element of the "contingent," or the "speculative," than by the rule, that the damage resulting from the deceit is the difference, between the value on the false statement, and the value on the fact? How is it possible, to "make the punishment fit the crime" with greater accuracy?

A jury "speculates" no more under this rule, than it is compelled to do in any case involving the question of the value of land; or, indeed, than it does in many cases of a valuation of personal property; or in cases of many kinds, which are decided on the opinions of experts.

It is precisely as easy, moreover, for a jury to estimate represented value, as actual value. Both are estimated, by experts, *on facts assumed*—which is merely one method of description. In estimating actual value, so-called, the land is described—by witnesses; then, on those facts assumed, that is, on that description, experts give their opinions; and, on those facts assumed, with the opinions, the jury forms its conclusion. In estimating represented value, the case is submitted in precisely the same way, on facts assumed; that is, on a description, of the same kind as that used in submitting the question of actual value, (the facts assumed being the facts falsely represented); the experts thereupon give their opinions on *that* description; and the jury thereupon form their conclusion as to *that* value. The method is precisely the same in both cases. The one involves just as much speculation, and conjecture, as the other. And no more.

Our opponents are compelled, by the necessities of their situation, to make an assault on the established general rule, under cover of an insinuation as to the character of the property purchased in this particular case.

It is quite evident, that the character of the purchased property, in any particular case, has no logical, or legal,

connection with the general rule of damages for all cases. Even if, therefore, it were the fact, that the purchase in this particular case had been of a property more or less "speculative," that fact would have no bearing whatever on the general rule of damages, either as to its principle, or its statement.

As matter of fact, however, a gold mine, if developed honestly, and sold honestly, is a property more free from the element of "speculation," than property of almost any other class, real or personal. The reason of that fact is to be found in the nature of its product, which is not only itself a thing of value, but has been long selected by all civilized peoples as the standard of all values, because of its own stability of value. No doubt, there is in the purchase of a gold mine, the element of the uncertain, of the "contingent." But that can be said of many purchases, of the purchase of a number of city lots, or of a large tract of farming land, or of a ranch. They are all more or less "speculative." City lots, especially, have for years been the sport of the speculator. City lots depend, for their value, on probable future uses, to be made of the lots themselves, and of other properties in their neighborhood. Farming land depends, for its value, on the future crops that can be raised from it. A ranch depends, for its value, on the cattle, or sheep, or horses, that can be raised from it. A gold mine, on the amount of gold which can be raised from it. But a gold mine that has been developed honestly, and is sold honestly, may easily be less "speculative," as a purchase, than city lots, or a large farm, or a ranch. Skilful experts, where the ore is exposed with honesty, can measure the exposed surfaces, can assay the ore specimens, and can make estimates of the metal to be extracted, with much greater accuracy than is possible as to the future profits of city lots, or the future crops of a farm, or the future profits of a ranch. The reason is, that a developed mine has fewer contingencies than almost any other kind of real estate. Especially, it is free from the

contingencies of the seasons. To skillful mining experts, it is simply a mathemathical problem, an engineering problem, susceptible, in the hands of competent men, of the same accuracy with other engineering problems. All these purchases are "speculative."

If, therefore, we should assume, that the purchase of this gold mine was, to some extent, "speculative," the question still remains, what was the reasonable rule, the best rule practicable, under which a jury should make its estimate of the damage resulting from a wilful deceit, as to *matters of fact*. For, of course, misrepresentations as to matters of opinion were not submitted to the jury.

The record in this case, moreover, is, that there was "sufficient proof to enable the jury to determine," both the "represented" value, and the "actual" value—as matters of fact.

It may be conceded, that the established rule allows a jury some latitude of estimate. But that constitutes no valid objection to the rule. That latitude is unavoidable. That possibility exists in many cases, in every case of valuation of land, in cases of damages for loss of time, damages to the person, to the feelings, injuries to real estate, and cases of many other classes. The rule in actions of deceit is no more difficult of application than in many others.

6. Nor does the contention of the defendant below, that the rule gives no credit or allowance to the defendant for the value of the property purchased, rest on good grounds.

On the contrary, the rule does precisely that; it does make an allowance to the defendant for the real value, when it directs the jury to assess damages at the difference between the real value and the value as represented. The fact that the rule makes that allowance constitutes one of the chief reasons on which the rule rests.

On the other hand, the rule which allows a recovery only of the money paid, is open to this very objection,

that it gives no consideration whatever to value, either to the value in fact, or the value as represented. It simply allows a purchaser to rescind. It does not rest upon the basis of awarding the actual damage caused by the deceit proved. It simply gives to the purchaser the right to abrogate the entire transaction. In other words, it allows, to a party who has been deceived by false statements, his other remedy—rescission. In short, it is in cases of rescission, and only in cases of rescission, that the purchaser has the right to recover the money consideration paid—as such.

7. The established rule works out justice to both parties, as perfectly as is possible.

The contract of sale stands. The plaintiff retains the purchased property. The defendant retains the purchase price. The defendant is then credited with the actual value, and is required simply to make good his false and fraudulent representations, by paying to the plaintiff the difference between the actual value and the value represented.

Especially in cases, where the deceit alleged is complex, as was the fact in the case at bar, where it was a combination of representations and acts, of acts which made the verification of the representations impossible, it is quite apparent that the established rule is the only one practicable, for the reason that the fraudulent acts charged may not all be found by the jury; and it is only for such as the jury find to be established on the evidence, that damages can be allowed. It is obvious, that to allow in all such cases a recovery of the money paid would be quite contrary to the principle which constitutes the foundation of the rule.

These considerations are the ones which have led the ablest jurists in England and the United States, to establish, and adhere to, the same rule in cases of deceit, which they all follow in cases of warranty, unless the intention was to lay down a wholly different rule in *Smith* v. *Bolles*.

IV.—The Court, in *Smith* v. *Bolles,* had no intention of departing from the established rule.

A careful examination of the record, with the authorities cited, will show that the Court only intended in that case to deny the right to remote and doubtful possible profits, which could not reasonably have been contemplated by the parties.

1. The opinion is of course to be read after the method recently laid down by the Court itself in *Pollock* v. *Farmers' Loan and Trust Company,* 157 U. S., 429, by Mr. Chief Justice Fuller (at p. 574).

"Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect to *decisions directly upon the points in issue.*

"The language of Chief Justice Marshall, in *Cohen* v. *Virginia,* 6 Wheat., 264, 399, may profitably again be quoted: 'It is a maxim not to be disregarded, that *general expressions,* in every opinion, are to be taken *in connection with the case* in which those expressions are used. If they *go beyond the case,* they may be respected, but *ought not to control* the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. *Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.*"

2. The opinion, throughout, makes not so much as an intimation, of any intention to depart from the long line of authorities which have been cited, or of the fact that there were any authorities at variance with the

language in the opinion; or of any intention to state any principle, or rule, that was new.

The learned Chief Justice, who wrote the opinion, made no reference to the unbroken line of authorities in Illinois. Mr. Justice Blatchford concurred in the opinion, making no reference to the unbroken line of authorities in New York. Mr. Justice Gray, who, as Chief Justice of the Massachusetts Supreme Court, had written the opinion in *Morse* v. *Hutchins* above quoted, concurred, and made no reference to the unbroken line of authorities in Massachusetts.

So that it is quite inconceivable, that either the learned Chief Justice, or either of those Associate Justices, or any other member of the Court, could have had any intention of departing from the old established landmarks, in this branch of the law.

There are, no doubt, many cases, to which the rule can have no application. Such were the cases cited by the learned Chief Justice in the opinion.

One was a case, where the plaintiff was not a purchaser of the entire property, as to which the false representations were made, but had acquired only a fractional interest in a speculative venture, on a false representation as to the price which the seller had originally paid for the entire property. Another case held, merely that the plaintiff could not recover "purely speculative benefits." Another was the case of misrepresentations as to the value of land, on which the plaintiff had made a loan; and his damages were limited to the loss on his loan. Another held, that a party, who was induced by fraud to enter a firm, and pay certain firm notes, could recover only the amounts he was compelled to pay.

Stated more in detail, those cases are as follows:

Crater v. *Binninger,* 33 N. J. Law, 513, decided only that there was error in the charge in that case, and that the established rule was not applicable to the facts of that case.

In *Crater* v. *Binninger* the plaintiff was induced to enter into an oil land speculation by the representation

of the defendant that the land cost $28,000. $4,000 was required for a working capital, and the defendant purchased an eighth for $4,000. He afterwards paid an assessment of $500 for the purpose of furnishing additional capital. A portion of the property was sold for $16,000. The actual cost of the property to the defendant was $18,000. The Court below ruled that the plaintiff was entitled to recover the difference between his investment ($4,500) and the actual cost of the same to the defendant ($2,000) viz., $2,500 *without taking into account the value of the land remaining unsold.* The defendant contended that the measure of damages was one-eighth of the real difference between the "cost" and the represented cost (not including the $500); and on appeal it was decided that the damages arising from a false representation are not necessarily limited to the difference between the actual value and the represented value in all cases. In the opinion of the Chancellor, on page 522, it is stated that the difference between the actual value and the represented value is in many cases the measure of damages; and *Stiles* v. *White,* 11 Met., 356, and *Cary* v. *Gruman,* 4 Hill, 627, are cited by the Court with approval. In each of the two last named cases the measure of damages was held to be the difference between the actual value and the value as represented. In *Crater* v. *Binninger* the Court lays stress upon the fact that the plaintiff was *not a purchaser of the property,* but was induced by the representation in question to embark in a speculative enterprise, which would naturally result in further investment and loss.

Fitzsimmons v. *Chapman,* 37 Michigan, 139, decided only that "damages are not recoverable for the loss of *purely speculative benefits* that cannot be estimated by any certain standard."

Here, again, we come upon the real point, on which the Chief Justice was really laying stress, that of possible prospective profits.

That the Michigan Supreme Court did not intend in

that case to depart from the established rule in actions of deceit is clear from the fact that in the same volume of its reports we find the following statement of the rule by Judge COOLEY in the case of *Page* v. *Wells*, 37 Mich., 415: "If the plaintiff was induced to purchase lands on representations which proved to be untrue, the measure of his loss, as it seems to us, would be perfectly plain, and would be reached by an answer to the following question: *How much less is the land worth as it is, than it would have been if its condition and quality had been as represented? This is the only safe and only reasonable rule.*"

Horne v. *Walton*, 117 Illinois, 130, was a case where the rule was clearly inapplicable, as the misrepresentation was as to the value of land on which the plaintiff had made a loan. The recovery was properly limited to the amount lost on the loan. The plaintiff was not a purchaser of the land. The Court in that case, at page 134, expressly recognize the soundness of the established rule. But they say, "this instruction was properly refused, as being *inapplicable to the facts of the case.* Where there has been a *sale* of land, and fraudulent representations have been made as to its value or quality or condition, the measure of damages is, *undoubtedly*, the *difference* between the *actual value* of the land and the *value* of *it*, as it was *represented* to be at the time of the sale. In this case there was *no sale*, but a *loan.*"

When examined more closely it will be seen that the rule there laid down is really the same which we are contending for. In other words, what a lender of money intends is the certainty of getting back his money, that is security for his loan. He can never get more than the amount of his loan. From that fact alone, the represented value of that which he receives is fixed. In this respect, the position of the purchaser of lands is quite different, because he is entitled to the land's entire

value. But the measure of damages in an action of deceit is the same in both cases. This is brought out clearly in the opinion of Judge COOLEY in a precisely similar case, the case of a loan on inadequate security, induced by fraudulent representations as to the value of the security. The damages were held to be the difference between the loan and the actual value of the security.

Briggs v. *Brushaber*, 43 Mich., 330.

Judge COOLEY there says: "In this case the plaintiff was damnified as soon as the loan was made. She had been induced to part with her money for something of much less value than that which it was agreed she should receive for it. The mortgage was marketable commodity, and she lost by the fraud itself the *difference* between the market *value* of that which she *received* and that *which she was to have under the arrangement.*"

Schwabacher v. *Riddle*, 84 Illinois, 517, merely holds, that one who has been induced by fraud to become a member of a firm, and is thereafter compelled to pay a proportion of certain firm notes, can recover only the damage resulting from the fraud. No other point was raised, or decided. That, too, was not the case of a purchase of property. The Court say: "So much of the loss as was sustained in consequence of the misplaced confidence in Fosbender's solvency alone, is most clearly not chargeable to the other parties. If appellee is entitled to recover, it is for the injury done him by the defendants, and not for injuries sustained in consequence of circumstances over which they had no control."

Slingerland v. *Bennett*, 66 N. Y., 611, decided only that in any action for breach of warranty as to the responsibility of the maker of a note given to plaintiff on a sale of a horse, the plaintiff could not recover the costs of a judgment on the note, but only the amount

of the note with interest. Not so much as an allusion is made to the established rule on sales.

It is apparent, therefore, that not one of the authorities cited by the Chief Justice questions the established rule, that several of them expressly assert it, and that they all go virtually on some other question, of what was or was not damage resulting from the fraud in that particular case.

3. The decision in *Smith* v. *Bolles,* rightly interpreted, must be held to be a decision, only that the measure of damages is not the difference between the represented value and the contract price.

At the same time, the opinion states the established law, that there is no right, in such a case, to recover remote possible prospective profits.

The position taken by the plaintiff in error in that case, as appears from his brief in the record, was as follows:

"The Court charged the jury that the measure of recovery is generally the difference between 'the *contract price* and the *reasonable market value.*' We submit that this is not the rule. * * * To test the effect of the rule given, take an example. Suppose testimony had been given tending to show that this stock was worth $5 a share, and that it would have been worth $10 a share had it met the representation of the defendant. The measure of damages then would have been $5 a share. And yet the Court said to the jury that the damages were practically $8.50 a share in the case supposed—the difference between the *contract price $1.50 and the reasonable market value if the property had been as represented,* namely $10 a share."

The opinion of the Court must be read in connection with the contention just stated.

The opinion reads as follows:

"The bill of exceptions states that the Court charged

the jury "as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the *contract price* and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been in the evidence before you."

"In this there was error. The measure of damages was *not* the *difference* between the *contract price* and the reasonable *market value* if the property had been *as represented* to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff *might have gained is not the question*, but what he had *lost* by being *deceived* into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as *naturally and proximately resulted from the fraud.* He was bound to *make good the loss sustained*, such as the moneys the plaintiff had paid out, and interest, and any other outlay *legitimately attributable* to defendant's *fraudulent conduct;* but this liability did *not* include the *expected fruits of an unrealized speculation.* The reasonable *market value*, if the property had been as represented, afforded, *therefore*, no proper element of recovery.

"*Nor* had the *contract price* the bearing given to it by the Court. What the plaintiff *paid* for the stock *was properly put in evidence, not* as the *basis* of the

application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the *loss* he had *sustained* in that particular. If the stock had a *value in fact*, that *would necessarily* be applied in *reduction* of the *damages*. 'The damage to be recovered must always be the *natural and proximate consequence of the act* complained of,' says Mr. Greenleaf, Vol. II., § 256; and 'That test is,' adds Chief Justice Beasley in Crater *v.* Binninger, 33 N. J. L., 513, 'that those results are *proximate* which the wrong-doer from his position must have contemplated as the *probable consequences of his fraud* or breach of contract.'"

It is plain, therefore, that the Court intended to decide the case on the principles here stated as the foundation of the rule.

The rule stated in the Court below did give to the plaintiff the "expected fruits of an unrealised speculation." Therein it differed from the established rule. The established rule works out the opposite result, the one which should be worked out, according to the principle stated by this Court in *Smith* v. *Bolles*.

We do not contend, that the "*market* value" is one of the elements in estimating the damage resulting from a proved deceit. Our contention is, that the element is the *actual* value. The market value is, no doubt, often the easiest way of proving actual value. But there are many cases, where there is no such thing as "market value." In every case of deceit, however, the main element in the computation of damage is "actual" value. So it is stated by Lord Cotton, in *Peek* v. *Derry*, as stated on our opponent's brief (p. 9).

The fact is, that our opponents have not correctly apprehended our position. The position for which we contend is, that the measure of damage is the difference between represented value and "actual" value.

V.—No argument of weight can rightly be drawn from the fact, that some of our courts, especially the Federal Courts, have followed *Smith* v. *Bolles* since the decision was promulgated. That result was to be expected. Those cases, we respectfully submit, can have no weight as authority, for the reason that they have themselves been mere submissions to authority.

Even with those decisions against us, however, we ask the Court to make a comparison, as to weight of authority, between the list of cases which we present in support of the established rule, and those that our able and diligent adversaries have been able to discover, in opposition to it.

But we do most strenuously insist, that, under the present resulting situation, this Court should now give its decisive authority in support of the rule which was formerly free from any substantial controversy, the only rule which can be sustained on principle, on sound reason, and thus put an end to all doubts and discrepancies in this branch of the law.

VI.—The question certified should be answered in the affirmative as to proposition A, that is, that the measure of damages to be applied in assessing plaintiff's recovery is the difference between the value of the property as it proved to be and as it would have been if as represented.

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